STATE OF MICHIGAN

COURT OF APPEALS

STEVEN H. LYERLA, Plaintiff-Appellant,	UNPUBLISHED May 13, 2004
v	No. 245909 Jackson Circuit Court
SUPERIOR INDUSTRIAL SALES, INC., Defendant-Appellee.	LC No. 01-005807-NO

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Jackson Circuit Court granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Material Facts

Plaintiff was injured when a lift truck owned by his employer, Michigan Seat Company, backed over his foot. Plaintiff testified during his deposition that he neither saw nor heard the lift truck before being struck. Seventeen days before the accident defendant had replaced the audible warning alarm on the lift truck.

Plaintiff initiated the present action by filing a third-party tortfeasor claim against defendant, in which he asserted that defendant had negligently installed the replacement alarm at the front of the lift truck, despite the fact that the alarm was called a back-up alarm and its instructions recommended that it be installed at the rear of the lift truck. Moreover, plaintiff asserted that defendant had negligently failed to equip the lift truck with visual warning systems such as strobe lights, and that it had negligently failed to furnish Michigan Seat Company with a lift truck that was equipped with proper warning devices. The circuit court granted defendant's motion for summary disposition, holding that defendant's duty to plaintiff was limited under the circumstances to properly replacing the audible alarm at the front of the lift truck, where the original alarm had been mounted, and that defendant had acted reasonably in doing so.

II. Analysis

"Questions regarding the nature and extent of a tortfeasor's duty are issues of law subject to review de novo." *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001), citing *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). A trial

court's ruling on a motion for summary disposition is also reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Our Supreme Court stated the legal standard to be applied to a motion for summary disposition brought under MCR 2.116(C)(10) in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).[1]

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), citing *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993); *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). In the present case, the parties do not dispute that plaintiff suffered damages. Rather, they focus their arguments on whether defendant owed a duty to plaintiff, whether defendant breached any duty that may have been owed to plaintiff, and causation.

A legal duty is one "which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) "Whether a duty exists is a question of law that is solely for the court to decide." *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999), citing *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). "However, if there are factual circumstances that give rise to the duty, the existence of those facts must be determined by a jury." *Howe v Detroit Free Press*, 219 Mich App 150, 156; 555 NW2d 738 (1996), aff'd 457 Mich 871; 586 NW2d 85 (1998), citing *Farwell v Keaton*, 396 Mich 281, 286; 240 NW2d 217 (1976).

In the present case, we conclude that although defendant owed a duty to plaintiff, there was no genuine issue of material fact that defendant did not breach the duty owed. Specifically, this Court has recognized that "a party to a contract may be held liable in tort for an injury suffered by a third party (i.e., a person not party to the contract) who is foreseeably injured by the negligent performance of the contract." *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 708; 644 NW2d 779 (2002), citing *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d

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[1] In arguing that summary disposition was improper, plaintiff relies on such cases as *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973) overruled in part by *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).. However, *Rizzo* and other summary disposition cases decided prior to the 1985 court rules no longer contain the correct standard. See *Maiden, supra* at 120-121.

755 (1967); *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 212; 565 NW2d 907 (1997). In this case, the parties do not dispute that Michigan Seat Company hired defendant to replace the existing alarm, which was mounted on the front of the lift truck, and which had become damaged. However, despite the assertions in plaintiff's complaint that the alarm was not operational, and that plaintiff did not hear it at the time of the accident, plaintiff has not disputed the testimony of his co-worker, William Clark, that the alarm was, in fact, operational on the day of the accident before it occurred. Thus, we conclude that plaintiff did not establish a genuine issue of material fact regarding whether defendant breached its duty by not ensuring that the alarm was operational upon installation.

Plaintiff, however, appears to assert that defendant's duty went beyond merely replacing the existing alarm in working order. Instead, plaintiff asserts that defendant was required to take additional steps to ensure his safety by determining the appropriate location for the alarm and installing visual warning devices, such as strobe lights. In support of his assertion, plaintiff relies on this Court's holding in *Ray v Transamerica Ins Co*, 46 Mich App 647, 657; 208 NW2d 610 (1973), which quoted the rule set forth in 2 Restatement Torts, 2d, § 324A, p 142, that:

> "One who undertakes, gratuitiously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, *if*
>
> "(a) his failure to exercise reasonable care increases the risk of harm, *or*
>
> "(b) he has undertaken to perform a duty owed by the other to the third person, *or*
>
> "(c) the harm is suffered because of reliance of the other or the third person upon the undertaking." [Emphasis in *Ray*.]

We believe plaintiff's reliance on *Ray* is without merit.

In *Ray*, the plaintiff was injured by a press to which the protective cover for a gear had been lost. An "insurance engineer" of the defendant insurance company, which the plaintiff sued as a third-party tortfeasor, "testified that he was the 'eyes of the insurer', and that his job was to give guidance and education in safety matters." *Id*. at 650-651. Moreover, the engineer had recommended that the plaintiff's employer equip the press with special switches and a wire guard to increase safety. *Id*. at 651. On appeal, one of the issues considered by this Court was "whether plaintiff's theory that defendant had undertaken to furnish safety inspection, giving rise to a duty to use reasonable care on behalf of the plaintiff, is supported by the record." *Id*. at 653. In resolving this issue, this Court stated:

> *This is not to say that a mere failure to suggest or recommend a safety change would impose a duty and liability. It would not*. On the facts adduced, the jury must have found that defendant had voluntarily and *actively* undertaken to assist [the plaintiff's employer] in performing the obligation owed by every employer to his employees--to provide a safe place to work. Having undertaken the duty, defendant is held to a standard of due care. [*Id*. at 654 (Emphasis in *Ray* in part).]

In the present case, plaintiff has introduced no evidence that defendant had actively undertaken to assist Michigan Seat in performing its obligation to provide its employees with a safe work environment, via placement of the audible alarm or visual warnings, beyond merely replacing the audible alarm in its previous location. Moreover, plaintiff has not shown that there are factual circumstances giving rise to such a duty that need be determined by a jury. Instead, if anything, defendant merely failed to suggest or recommend a safety change, which it had no duty to do in the first place.

While defendant's president and general manager, Charles Goostrey, did testify that defendant's mechanics would inform a customer who brought a piece of equipment to its facility that something needed to be repaired, plaintiff has introduced no evidence that defendant's mechanics ever advised Michigan Seat as to the need for visual warnings on its lift trucks, or the need to change the location of the audible alarms, or that Michigan Seat expected such advice from defendant. Moreover, the fact that Michigan Seat has only called upon defendant to repair its lift trucks for a period of six years does not create a duty on defendant of ensuring that the design, placement, and type of warning devices on its lift trucks provides a safe work environment for its employees.

Plaintiff also relies heavily on the fact that the audible alarm defendant installed on the lift truck is described as a back-up alarm, and that the manufacturer's installation instructions recommend that it be installed at the rear of the lift truck. However, testimony from plaintiff, plaintiff's co-worker William Clark, and two of defendant's mechanics, Bryan Poynter and James Buntin, established that Michigan Seat did not utilize the alarm on the lift truck that hit plaintiff solely as a back-up alarm, but that the alarm operated continuously and was used to warn plant workers of approach both when the lift truck was being driven forward and in reverse. In addition, both Goostrey and Buntin testified that defendant did not sell Michigan Seat the lift truck that hit plaintiff, a fact which plaintiff did not dispute in his response to defendant's motion for summary disposition.

Furthermore, Poynter and Buntin both testified that the damaged alarm which they replaced was mounted on the front of the lift truck, and that Mark Toth, a former Michigan Seat employee who oversaw all of the lift trucks and who would call defendant for repairs, had instructed them to mount the replacement alarm in the same location. Plaintiff offered no evidence in contravention of their testimony in response to defendant's motion for summary disposition.[2]

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[2] On appeal, plaintiff has presented an affidavit from Michigan Seat which states that no Michigan Seat employee, including Mark Toth, ever instructed defendant's mechanics to place the alarm on the front of the lift truck. However, the affidavit is neither signed by any Michigan Seat employee nor is it notarized. MCR 2.113(A). This affidavit also differs significantly from the affidavit plaintiff submitted to the trial court in opposition to defendant's motion for summary disposition. Specifically, the affidavit submitted to the trial court does not contain the above testimony from any Michigan Seat employee. Even if the affidavit plaintiff has submitted to this Court bore a notarized signature to show that it was the testimony of a Michigan Seat employee, we would not consider it in this appeal, as our review of a grant or denial of a motion

(continued…)

Therefore, we conclude that defendant did owe plaintiff a duty to properly install the alarm in a reasonable manner based on its contract with Michigan Seat Company, which it did not breach because the alarm functioned properly after installation. However, defendant's duty to plaintiff did not extend in scope so as to require it to make determinations as to where the alarm should be mounted or whether visual warnings such as strobe lights should have been mounted on the lift truck because defendant did not actively undertake to assist Michigan Seat in making such determinations. Therefore, we conclude that the trial court correctly held that defendants' duty was limited to replacing the alarm and that plaintiff had not created a genuine issue of material fact that defendant breached that duty. Because the circuit court's grant of defendant's motion for summary disposition was appropriate based on the element of duty, we decline to address the parties' arguments regarding breach and causation.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio

(…continued)

for summary disposition is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).